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In the Supreme Court of the United States

OCTOBER TERM, 1920

BRITISH COLUMBIA MILLS TUG & BARGE COMPANY, LTD., a corporation,

Petitioner,

vs.

A. W. MYLROIE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO THE PETITION

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PRELIMINARY.

Before answering the petition and brief of petitioner on its merits, the respondent respectfully submits for the consideration of the court the following point:

UNTIMELINESS OF THE PETITION.

The decision and decree of the appellate court, reversing the trial court and remanding the cause for further proceedings with leave to the respective parties to introduce further evidence on the question of damages, sought to be reviewed by this proceeding in this court, is not a final decree.

We understand the rule to be, that in cases where, there being only a matter of private interest, there has been no final judgment in the appellate court, the writ is denied.

> *Forsyth v. Hammond*, 166 U. S. 506, at 514.
>
> *Chi. & N. W. R. R. Co. v. Osbone*, 146 U. S. 354.

Except in extraordinary cases, the writ is not issued until final decree.

> *Hamilton Brown Shoe Co. v. Wolf Bros. Co.*, 240 U. S. 251, at 258.

Citing:

> *Am. Con. Co. v. Jacksonville, etc., R. Co.*, 148 U. S. 372.
>
> *The Conqueror*, 166 U. S. 110, 113.

Parties and elements of peculiar gravity and importance:

This is a cause between private parties arising out of a collision and involving a question of negligence and consequent damages and there are present no elements of such peculiar gravity or general importance as to require the review by this court of an interlocutory decree.

Public interest and uniformity of decisions:

There are no public interests directly involved and none indirectly which would be prejudiced by a refusal of the writ at this time and at this stage of the cause.

A casual reading of the opinion of the court of appeals complained of will disclose the fact that it is in harmony with the opinion of this court in the case of *The Syracuse,* 12 Wall. 167, the leading case on the question of the invalidity of a clause exempting a tug from liability for negligence, in a towage contract.

The petitioner relies upon the case of *The Oceanica,* 170 Fed. 893, C. C. A., Second Circuit, as a leading case, wherein that court reviewed *The Syracuse, supra,* and with which it is in direct conflict.

A petition for a writ of certiorari in *The Oceanica* case was denied by this court (215 U. S.

599). But such denial is not to be considered as an affirmance of the opinion of the appellate court and therefore as a reversal by this court of the rule announced in *The Syracuse*.

Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U. S. 251, 258.

Where a federal circuit court of appeals follows this court, it would be an anomaly to invoke the writ of certiorari against that appellate court in the interest of uniformity of decisions among the several federal circuit courts of appeal, because the decision complained of, though in harmony with the decisions of this court, is alleged to be in conflict with the decision of another federal circuit court of appeals.

A review by this court at this stage of the cause, affirming the decree of the appellate court, would not preclude a further review by this court, on certiorari, following a decree by the trial court for damages, affirmed by the appellate court; and there is no "law of the case" settled by the interlocutory decree sought now to be reviewed by this court which may not be noticed and rectified by the appellate court on a second appeal or by this court upon certiorari, if the present application is denied.

Without good reason, the petitioner should not be permitted to thus split the cause and the respondent thus possibly be put to the burden, cost and unnecessary delay of two hearings on the merits, of two different branches of the case, in this court.

No good reason has been shown.

ON THE MERITS.

Answering the petition and brief of petitioner in the order in which the points are raised therein, respondent respectfully submits:

I.

The validity of contract exemption from liability for negligence in towage contract.

The petitioner complains that the Circuit Court of Appeals has denied the validity of a towage contract exempting the tug and her owners from liability for negligence of her master and crew.

The court of appeals, in holding against the validity of such contract, based its decision on the case of *The Syracuse*, 12 Wall. 167, and said:

> "It is not claimed that the decision of the Supreme Court in the case of the *Steamer Syracuse* has ever been expressly reversed or indeed criticised by that court, but it is contended in effect that it has been practically reversed because it denied a petition for a writ

of certiorari in the case of *The Oceanica,* decided by the Circuit Court of Appeals, 2nd Circuit, 170 Fed. 893, in which the majority of the court—one judge dissenting—held that a contract of towage by which the tow assumes all risks released the tug from liability for her own negligence resulting in injury to the tow, the majority of the court conceding in its opinion on rehearing that its decision to that effect was a departure from previous decisions.

"A careful examination of the prevailing opinions in that case, we think, shows that that decision was really based upon the law prevailing in the state of New York under which even a common carrier may contract against its own negligence, and such may have been the theory upon which the Supreme Court denied the petition for a writ of certiorari in the case * * *

"It seems to us that if the Supreme Court had been dissatisfied with its previous decision in the case of the *Steamer Syracuse* it would have granted the writ of certiorari in the case of *The Oceanica* and have reconsidered the question; and that we would not be justified in regarding its denial of the writ in the last mentioned case as in effect departing from the rule announced in the case of *The Syracuse* which has stood unreversed, and, so far as we are advised, without criticism by it for so many years" (Rec. 756, 757).

It is a conflict of *law*, not a conflict of *decisions*, which marks the instance case from *The Oceanica* and other cases from the second circuit, cited by petitioner (Pet., pp. 8, 9)—in the instance case the

maritime law being applied, in *The Oceanica* and the other cases the local law of the state of New York.

The case of *M. P. Doullut & Son v. General Contract Company*, 221 Fed. 876, cited by petitioner (Pet., p. 9) from the fifth circuit, involved a contract to tow a raft of piles, where, on account of their condition, many of which would not float, their owner agreed to assume the risk incident to their unseaworthy condition, and is not in conflict with the instance case or with *The Syracuse* case.

The cases from this court, cited by petitioner (Pet., p. 9), hold that the rule as to invalidity of contract exemption from liability for negligence by common carriers has no application where a railway company is acting outside of the performance of its duty as a common carrier; in such a case it is dealing with matters involving ordinary considerations of contractual relations; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own negligence are not repugnant to the requirements of its public service; and that *the rule extends no further than the reason for it.*

In the case of *The William H. Webb,* 14 Wall. 406, decided subsequently to *The Syracuse,* this court

held that a towage contract does not impose either an obligation to insure or the liability of a common carrier; that the towage contract requires no more than that he who undertakes to tow should carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar service.

In *The Syracuse,* 12 Wall. 167, the leading case, a case of towage contract, where the tow agreed to assume the risk of towage, this court held that notwithstanding such contract, the towing steamer was liable if, through her negligence, the boat towed suffered loss; that while the policy of the law does not impose upon the towing boat the obligations of a common carrier, it does require reasonable care, caution and maritime skill, and if these are neglected and disaster occurs, the towing boat must be visited with the consequences.

In the case of *The John G. Stevens,* 170 U. S. 113, this court, in considering whether a claim by a tow against her tug for damages from coming into collision with a third vessel, by reason of negligent towage, is a claim in tort, standing upon the same ground as a claim of a third vessel for damages against the tug, referred to the conflicting decisions of the federal district courts, and after citing cases

in support of the proposition that the tow's claim against her tug for damages by negligence of the tug was founded upon a voluntary contract between the owners of tug and tow, which cases it disapproved, cited approvingly the cases of *The Brooklyn,* 2 Ben. 547; *The Deer,* 4 Ben. 352; *The Arturo,* 6 Fed. 308; and *The Liberty No. 4,* 7 Fed. 226, 230, to the effect that the claim by a tow against her tug for damages caused by negligent towage is founded in tort, arising out of the duty imposed by law and independent of any contract made or consideration paid for the towage; that those cases of tow against tug are, in form and fact, very like collision cases; that the contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet; that there is an analogy between the two classes of cases so close that the tow may sue in one proceeding for damages her own tug and a strange vessel with which she has been in collision; and further cited approvingly *The Syracuse, supra,* to the effect that the tug could not contract to exempt itself from liability for its own negligence.

The rule is that the liability of a tug under a towage contract while not that of a common carrier, is, nevertheless, like the liability of a common carrier, created by law independent of contract or con-

sideration paid, and that the policy of the law imposes on the tug, though not a common carrier, the obligation to exercise reasonable care, caution and maritime skill, which obligation it cannot throw off, and if these be neglected and disaster occurs the tug must be visited with the consequences.

II.

The towage contract never attached because of the unseaworthiness of the tug.

The respondent (libellant and appellant below) further contended that even if the attempted limitation of liability of the tug was valid, the towage contract was based upon a warranty of seaworthiness of the tug which did not exist at any time from the commencement of the voyage, for the reason that immediately prior to and during the whole towage service the tug lacked a sufficient complement of men to enable it to station a lookout upon it at any time during the voyage and because of the lack of a proper lookout the disaster occurred, and that by reason of such breach of warranty, the towage contract never attached.

In the towage case of *The Lady Pike*, 21 Wall. 1, this court said:

"Standard authorities show that the first

> duty of the carrier and one that is implied by law, is to provide a seaworthy vessel * * * with a crew adequate in number and competent for their duty with reference to all of the exigencies of the intended route."

The necessity for a vigilant lookout in the instant case is evident from the fact that the night was dark, stormy, with snow squalls (Rec. 232, 317), that this particular stretch of water (where the disaster occurred) is a hard track to steer (Rec. 572); one of the most difficult ones that we have (Rec. 607); and that a smoke screen was blowing over the port bow of the tug from her stack and obscuring the vision of those in the pilot house in the direction in which the tug was proceeding and in which lay the island with which the tow came into collision (Rec. 233), all according to the testimony of petitioner's witnesses at the trial.

The court of appeals found:

> "According to the uncontroverted testimony of the captain of the tug in the present case, its crew consisted of two engineers, two firemen and two coal passers, all of whom were confined entirely to the engine department, one cook, whose duties were confined to the galley, one deck hand whose duties were to walk around the deck all day and sleep at night 'unless called for something,' and two other deck hands whose duties were to stand watch and watch as helmsmen—the other three men on the tug being the

> captain thereof (Johnson), one mate named Dawe, and Captain Bjerre who, according to the testimony of the captain of the tug was 'shore skipper' and 'don't make trips like that,' the one in question, but was on that voyage entered on the articles as 'purser' and acted as 'pilot' " (Rec. 759).

The trial court found that:

> (the tug) "it is true, had not on the bow or in the pilot house any one whose sole duty it was to act as lookout, but it did have an experienced man in the pilot house who testifies that in fact he did keep *constant* lookout (italics the court's)" (Rec. 732).

How far that experienced man came from measuring up to the requirements as announced by this court in the case of *The Ariadne,* 13 Wall. 475, 478, where it was said:

> "The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and lives on board. * * * In the performance of this duty the law requires indefatigable care and sleepless vigilance"

is obvious from the fact that the witnesses for petitioner at the trial testified that this experienced man was, during the night of the disaster in question, acting as pilot (Rec. 231), in consultation with the master from time to time (Rec. 287, 319, 350, 360),

directing the movements of the vessel (Rec. 317), and laying out courses on the chart in the pilot house of the tug (Rec. 326, 341, 342).

Petitioner errs where it states that the court of appeals did not decide that the tug was "not provided with a crew adequate in number and competent for the duties with reference to all exigencies of the intended route" and where it states, "The said court did decide that because the lookout was improperly and negligently performed the vessel was 'to that extent unseaworthy'." (Pet. p. 13.)

The appellate court in discussing this point found (1) that it was conceded that the tug did not have a lookout stationed forward; (2) that outside of the men in the engine room and the galley whose duties were confined respectively to the engine room and galley, the tug had one deck hand who worked all day and slept at night, two other deck hands who stood watch and watch as helmsmen, a captain and a mate, standing watch and watch, and a pilot; (3) that the pilot and the helmsman were alone in the pilot house of the tug at the time of the dangerous situation; (4) that the evidence clearly shows that neither man in the pilot house constituted a lookout as contended for by petitioner; (5) that it could not be held that a lookout properly stationed would

not have seen and reported the island ahead in ample time to have afforded the tug ample opportunity to make a safe turn with the tug following (Rec. pp. 759, 760, 761); and concluded as follows:

> "We entertain no doubt that under the law, applied to the existing conditions, the absence of a man to serve as a lookout was the absence of an essential part of the proper equipment of the tug and rendered it to that extent unseaworthy" (Rec. 762).

Where there is a negligent performance of lookout duty, assuming a sufficient crew to enable a proper lookout to be properly stationed, such negligence would not constitute unseaworthiness of the tug, but only a neglect on the part of those in charge of her navigation; but where the number of the crew from the commencement of and during the whole towage service is inadequate to enable a proper lookout to be stationed, and the absence of such lookout so stationed, was the cause of the disaster, then we contend as we contended in both courts below and as was concurred in by the appellate court, that the absence of such a man was the absence of an essential part of the equipment of the tug and rendered it to that extent unseaworthy.

> "In every contract for the carriage of goods by sea, unless otherwise expressly stipu-

lated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage."

* * * * * * *

"After renewed consideration of the subject in the light of able arguments presented at the bar, we see no reason to doubt the correctness of the rule thus announced.

* * * * * * *

"In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea.

* * * * * * *

"The necessity of this conclusion is made obvious when we consider the settled rule in respect of insurance; for it is clear that the undertaking as to seaworthiness of the shipowner to the shipper is co-extensive with that of the shipper to his insurer.

"That rule is thus given by Parsons (1 Marine Insurance, 367): 'Every person who proposes to any insurers to insure his ship against sea perils, during a certain voyage, impliedly warrants that the ship is in every respect in a suitable condition to proceed and continue on that voyage and to encounter all common perils and dangers with safety. * * * The warranty is strictly a condition precedent to the obligation of the insurance; if it is not performed, the policy does not attach and if this condition be broken at the inception of the risk in any way whatever and from any cause whatever there is no contract of insurance, the policy being wholly void.' "

The Caledonia, 157 U. S. 124, 131.

We submit that the tug was unseaworthy to the extent found by the court of appeals and therefore the towage contract with its exemption clause never attached.

III.

Negligence of the tug. Seaworthiness of the tow's shackle.

The petitioner complains that the court of appeals decided that the tug was guilty of negligence in causing the loss, viz, in putting the helm hard over without warning the tow, and submits that this finding and all the findings of negligence of the tug are contrary to the weight of and not supported by the evidence and clearly erroneous.

And petitioner further complains of the finding of the court of appeals that the tow's shackle was not defective, which petitioner submits is contrary to and not supported by the evidence.

We do not understand that at this time it is proper procedure to take up such questions of fact in our brief with extracts at length from the record or that such complaints of petitioner in respect thereto are alone grounds for the granting of the writ, and for that reason and that reason alone, relying upon the record, we content ourselves with

the statement that the weight of evidence is clearly in support of the findings of the appellate court, both as to the negligence of the tug and as to the seaworthiness of the tow's shackle.

Neither of the courts below found the weight of the evidence in favor of the petitioner. The Court of Appeals found it in favor of the respondent; and the trial court, after finding that the tug did not have, on the bow or in the pilot house, any one whose sole duty it was to act as lookout (Rec. 732), disregarded the rule of this court in *The Genessee Chief*, 12 How. 443, 463:

> That such a finding must begarded as *prima facie* evidence of fault of the tug;

and the rule in *The Ariadne*, 13 Wall. 475:

> That every doubt as to the performance of the duty (of lookout) and the effect of non-performance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary;

and dismissed the libel on the ground that he "was unable to find from a preponderance of the evidence that there was actionable negligence on the part of the tug" (Rec. 734).

CONCLUSION.

First: The application for the writ is untimely.

Second: The findings of fact in the opinion of the appellate court complained of are supported by the weight of the evidence.

Third: The decision complained of is in harmony with the decisions of this court on the questions of law involved.

Fourth: The petition should be denied.

Respectfully submitted,

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